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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MAIDSVILLE COAL COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT M. STEPTOE, JR.
(Counsel of Record)
C. DAVID MORRISON
STEPTOE & JOHNSON
Union National Center East
P. O. Box 2190
Clarksburg, WV 26302-2190
(304) 624-8000
Counsel for Petitioner

STEPTOE & JOHNSON
Clarksburg, WV
Of Counsel

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the National Labor Relations Board may issue a *Gissel* bargaining order in "less extraordinary cases marked by less pervasive" employer unfair labor practices without first providing a detailed analysis of the residual impact of the unfair practices, the likelihood of recurring employer misconduct, and the potential effect of the Board's less severe remedies?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
A. Although Upheld As Sufficient By The Fourth Circuit's *En Banc* Decision, The Board's Use Of Boilerplate Language To Justify Its Bargaining Order Conflicts With The Rule Of Elucidation Announced By This Court In *NLRB v. Gissel Packing Co.*	7
B. The Board's Persistent Failure to Justify Its Imposition Of A Bargaining Order With Specific Findings In Accordance With The *Gissel* Criteria Has Created A Conflict Among The Circuits With Respect To The Review And Enforcement Of The Board's Decisions	9
CONCLUSION	14

TABLE OF AUTHORITIES

CASES	Page
Chromalloy American Corp. v. NLRB, 620 F.2d 1120 (5th Cir. 1980)	13
Donn Products, Inc. v. NLRB, 613 F.2d 162 (6th Cir. 1980)	11
First Lakewood Associates v. NLRB, 582 F.2d 416 (7th Cir. 1978)	12
Fitzgerald v. Century Park, Inc., 642 F.2d 356 (9th Cir. 1981)	12
Hedstrom Co. v. NLRB, 558 F.2d 1137 (3d Cir. 1977)	8, 9
J. J. Newberry Co. v. NLRB, 645 F.2d 148 (2d Cir. 1981)	11
Maidsville Coal Co., Inc. and UMWA, District 31, 257 N.L.R.B. 1106 (1981)	2
NLRB v. American Cable Systems, Inc., 427 F.2d 446 (5th Cir. 1970)	13
NLRB v. American Spring Bed Manufacturing Co., 670 F.2d 1236 (1st Cir. 1982)	10, 11
NLRB v. Appletree Chevrolet, Inc., 608 F.2d 988 (4th Cir. 1979)	6, 7
NLRB v. Century Moving & Storage, Inc., 683 F.2d 1087 (7th Cir. 1982)	12
NLRB v. Chester Valley, Inc., 652 F.2d 263 (2d Cir. 1981)	11
NLRB v. Cott Corp., 578 F.2d 892 (1st Cir. 1978)	11
NLRB v. Dadco Fashions, Inc., 632 F.2d 493 (5th Cir. 1980)	13
NLRB v. Eastern Steel Co., 671 F.2d 104 (3d Cir. 1982)	13
NLRB v. Ely's Foods Inc., 656 F.2d 290 (8th Cir. 1981)	13
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)	6, 7
NLRB v. Jamaica Towing, Inc., 632 F.2d 208 (2d Cir. 1980)	11
NLRB v. Keystone Pretzel Bakery, Inc., 696 F.2d 257 (3d Cir. 1982)	13
NLRB v. Maidsville Coal Co., Inc., 114 L.R.R.M. 2844 (4th Cir. 1983)	1
NLRB v. Maidsville Coal Co., Inc., 693 F.2d 1119 (4th Cir. 1982)	1, 2

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Marion Rohr Corp., Inc., 714 F.2d 228 (2d Cir. 1983)	11
NLRB v. Miller Trucking Service, Inc., 445 F.2d 927 (10th Cir. 1971)	12
NLRB v. Pace Oldsmobile, Inc., 681 F.2d 99 (2d Cir. 1982)	11
NLRB v. Permanent Label Corp., 657 F.2d 512 (3d Cir. 1981)	13
NLRB v. Pilgrim Foods, Inc., 591 F.2d 110 (1st Cir. 1978)	11
NLRB v. Rexair, Inc., 646 F.2d 249 (6th Cir. 1981)	11
NLRB v. Suburban Ford, Inc., 646 F.2d 1244 (8th Cir. 1981)	13
NLRB v. Valley Plaza, Inc., 715 F.2d 237 (6th Cir. 1983)	11
NLRB v. Western Drug, 600 F.2d 1324 (9th Cir. 1979)	12
NLRB v. Wilhow Corp., 666 F.2d 1294 (10th Cir. 1981)	12
Patsy Bee, Inc. v. NLRB, 654 F.2d 515 (8th Cir. 1981)	13
Peerless of America, Inc. v. NLRB, 484 F.2d 1108 (7th Cir. 1973)	9, 12
Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503 (7th Cir. 1980)	9, 10, 12
Southern Moldings, Inc. v. NLRB, 715 F.2d 1069 (6th Cir. 1983)	11, 12
United Services For The Handicapped v. NLRB, 678 F.2d 661 (6th Cir. 1982)	11
STATUTES	
28 U.S.C. § 1254(1)	2
National Labor Relations Act, 29 U.S.C. § 151, *et seq.*	
Section 7, National Labor Relations Act, 29 U.S.C. § 157	2

TABLE OF AUTHORITIES—Continued

	Page
Section 8(a)(1), National Labor Relations Act, 29 U.S.C. § 158(a)(1)	2, 3, 5
Section 8(a)(3), National Labor Relations Act, 29 U.S.C. § 158(a)(3)	2, 3, 5
Section 8(a)(5), National Labor Relations Act, 29 U.S.C. § 158(a)(5)	2, 3, 5
Section 10(b), National Labor Relations Act, 29 U.S.C. § 160(b)	3
Section 10(c), National Labor Relations Act, 29 U.S.C. § 160(c)	3
Section 10(e), National Labor Relations Act, 29 U.S.C. § 160(e)	2, 3, 4, 6
Section 10(f), National Labor Relations Act, 29 U.S.C. § 160(f)	6

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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Maidsville Coal Company, Inc.[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc* on rehearing, is not published in the Federal Reporter, but is reported at 114 L.R.R.M. 2844 (1983). The *en banc* opinion is reprinted in the Appendix at A1-A5. The opinion of the Fourth Circuit's original panel decision is reported at 693 F.2d

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[1] Petitioner, Maidsville Coal Company, Inc., will henceforth be referred to as "Maidsville Coal."

1119 (1982), and is reprinted in the Appendix at A6-A26. The decision and order of the National Labor Relations Board are reported at 257 N.L.R.B. 1106 (1981), and are reprinted in the Appendix at A29-A136.

JURISDICTION

On November 15, 1982, the panel decision of the United States Court of Appeals for the Fourth Circuit was rendered. On rehearing, the *en banc* judgment was entered on October 5, 1983. Because the ninetieth day from the entry of the *en banc* judgment falls on January 3, 1984, this petition is timely filed. The jurisdiction of this Court to review this case on certiorari rests on 28 U.S.C. § 1254 (1) and 29 U.S.C. § 160(e).

STATUTES INVOLVED

This case involves the following provisions of the National Labor Relations Act (29 U.S.C. § 151, *et seq.*), which, in pertinent part, states:

1. Section 7 (29 U.S.C. § 157):

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

2. Section 8(a)(1), (3) and (5) (29 U.S.C. §§ 158 (a)(1), (3) and (5)):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

3. Sections 10(b), (c) and (e) (29 U.S.C. §§ 160(b), (c) and (e)):

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. . . .

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . .

. . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceedings and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record.

STATEMENT OF THE CASE

Maidsville Coal has been engaged in the nonretail sale of coal for approximately twelve years at its Maidsville, West Virginia, facility. In March, 1979, the United Mine Workers of America [2] began efforts to organize Maids-

[2] The United Mine Workers of America will henceforth be referred to as the "UMWA."

ville Coal's production employees. On April 19, 1979, the UMWA filed an election petition with the Board, and approximately one week later, the union charged that Maidsville Coal had committed certain unfair labor practices during the course of the union's organizational drive.

After a hearing, on March 16, 1981, Administrative Law Judge Robert G. Romano [3] held that Maidsville Coal had violated §§ 8(a)(1), (3) and (5) of the National Labor Relations Act. Although Maidsville Coal contended that as of April 10, 1979, the UMWA had obtained signed authorization cards from only four of the nine bargaining unit employees, the ALJ concluded that the UMWA had obtained signed cards from a majority of five.[4] Finally, the ALJ recommended that Maidsville Coal be ordered to bargain with the UMWA upon request, explaining his recommendation as follows:

> I specifically conclude and find the unfair labor practices committed by the Employer were so pervasive and extensive that the possibility of erasing their effects on the employees and ensuring a fair election by use of the traditional remedies is slight. With employees being so conditioned, I find that in this case, employee sentiment, as expressed by the authorization cards is best protected by a bargaining order.

[A127]. Maidsville Coal filed exceptions to the ALJ's findings and conclusions, but, in a summary opinion, the Board adopted his findings and conclusions, including the recommended order to bargain.

When Maidsville Coal declined to bargain with the UMWA, the Board applied to the United States Court of

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[3] Administrative Law Judge Romano will henceforth be referred to as the "ALJ."

[4] Maidsville Coal argued in vain that Richard Heller, who signed a card, was a supervisor and should have been excluded from the proposed bargaining unit and that Jeff Freeman, who had not signed a card, should have been included.

Appeals for the Fourth Circuit to enforce its order.[5] In a panel decision, the Fourth Circuit upheld the Board's findings and conclusions with respect to the commission of the unfair labor practices. With one judge dissenting, however, the panel majority found that both the ALJ and Board opinions did not satisfy the prerequisites for issuing bargaining orders set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979). Specifically, the panel majority held that the ALJ and the Board had failed to sufficiently explain the reasons that "an election [would] not adequately reflect employee preferences" and that the Board's traditional remedies (e.g., cease-and-desist orders) would not effectively "erase any hint of coercion occasioned by the employer's unfair labor practices" [A11]. Accordingly, the panel majority refused to enforce the bargaining order and remanded the case for further consideration.

Prior to oral argument, Maidsville Coal moved to supplement the record by adding its president's affidavit. The affidavit showed that the employee complement had changed dramatically since the alleged unfair labor practices occurred in 1979.[6] The panel majority granted Maidsville Coal's motion and suggested that the Board take it into consideration on remand. [A13-A14].

Upon petition by the Board, the Fourth Circuit reheard the case *en banc* and, on October 5, 1983, reversed the panel majority in a 6-4 decision, ruling that the Board's

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[5] The Fourth Circuit had jurisdiction under 29 U.S.C. §§ 160(e) and (f).

[6] Indeed, Petitte's affidavit shows that the number of employees who would be included in the appropriate bargaining unit increased from nine in 1979 to nineteen at the time of oral argument in 1982. Moreover, of those nineteen, only five were in the original bargaining unit of nine employees, two of whom had signed authorization cards in 1979.

explanation of the reasons supporting its order to bargain was sufficient to satisfy the requirement of *Gissel* and *Appletree Chevrolet* [A5].

REASONS FOR GRANTING THE WRIT

A. Although Upheld As Sufficient By The Fourth Circuit's *En Banc* Decision, The Board's Use Of Boilerplate Language To Justify Its Bargaining Order Conflicts With The Rule Of Elucidation Announced By This Court In *NLRB v. Gissel Packing Co.*

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), this Court reiterated "that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *Id.* at 602. Accordingly, the Court limited the Board's discretion in imposing bargaining orders upon employers to two categories of cases. First, in "exceptional cases" wherein the employer has committed such "outrageous and pervasive" unfair labor practices that "their coercive effects cannot be eliminated" and "a fair and reliable election cannot be had," the Board may bypass the election process and order an employer to bargain with a union without first inquiring into majority status.[7] Second, in "less extraordinary" cases which are marked by "less pervasive" unfair labor practices, the Board may issue a bargaining order *only* in the event that it first finds specifically that (1) "at one point the union had a majority"; (2) "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight"; and (3) "employee sentiment expressed through cards would, on balance, be better protected by a bargaining order. . . ." *Id.* at 614-15.[8]

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[7] These are the so-called "Category I" cases.

[8] These are the so-called "Category II" cases.

In the case *sub judice*, a "Category II" case, the Fourth Circuit's *en banc* decision has allowed the Board to justify its issuance of a bargaining order against Maidsville Coal by merely reciting, in boilerplate form, this "Court's explanation of what kind of showing is necessary for the issuance of a bargaining order" [A12]. Despite the requirements of *Gissel*, the Board has not provided a detailed analysis justifying its imposition of a bargaining order. First, the Board has failed to provide an explanation of why Maidsville Coal's past practices would have an adverse residual impact on the employees' ability to vote freely and in an uninhibited fashion during an election. Obviously, the change in employee complement would be relevant to the "residual impact" determination; nevertheless, the Board has refused to consider the change.

Moreover, the Board did not provide any analysis of the likelihood of recurring employer misconduct. As repeatedly pointed out by Maidsville Coal, most of the unfair labor practices were committed by Maidsville Coal before it sought legal counsel and were committed in ignorance of federal labor law. There exists no indication that the Board took into consideration Maidsville Coal's record after it hired labor counsel and no elucidation of reasons why Maidsville Coal's labor practices are likely to recur.

Finally, the Board failed to explain why its less severe remedies probably would not have erased any residual impact of Maidsville Coal's past practices and would not have ensured a fair election. Specifically, "[t]here is no indication that traditional remedies such as cease-and-desist orders, the mailing or the reading of notices to employees during plant time, the posting of notices on Company billboards, or the granting to the Union of access to employees during work time at the plant, or a court injunctive order under § 10(j) (20 U.S.C. § 160(j)) as a last resort, will not remedy the unfair labor practices

charged here." *Hedstrom Co. v. NLRB*, 558 F.2d 1137, 1152 (3d Cir. 1977).

Clearly, the *en banc* majority has misperceived the scope of the Board's discretion to revert to the extreme remedy of the bargaining order by failing to require the Board to justify its reasoning before enforcing the Board's order. Thus, the decision of the *en banc* majority is in direct conflict with the principles announced in this Court's *Gissel* decision. Accordingly, review of the Fourth Circuit's *en banc* majority decision is warranted.

B. The Board's Persistent Failure to Justify Its Imposition Of A Bargaining Order With Specific Findings In Accordance With The *Gissel* Criteria Has Created A Conflict Among The Circuits With Respect To The Review And Enforcement Of The Board's Decisions.

Despite repeated requests from various courts of appeal in "Category II" cases, the Board continues to refuse to advance its reasoning, in accordance with the *Gissel* criteria, for the imposition of a bargaining order. As noted by the Seventh Circuit:

> Since the Supreme Court's decision in *Gissel*, the NLRB has been obligated to give reasons justifying the use of a bargaining order. In *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973), this court explained the importance of the Board's obligation to give "a detailed analysis" of the "possibility of holding a fair election in terms of any continuing effect of misconduct, the likelihood of recurring misconduct, and the potential effectiveness of ordinary remedies," 484 F.2d at 1118, as an aid to judicial review. . . . [E]ven a cursory examination of the decisions applying *Gissel* in this circuit and in other circuits reveals that the Board has declined repeatedly to assist the courts with [its] expertise by revealing reasons for issuing *Gissel* bargaining orders [citations omitted]. . . . Furthermore, this reticence persists despite repeated judicial references

> to the importance of the Board's making known its reasoning as an aid to judicial review. . . . It is unfortunate that this fundamental question of employee representation rights receives so little attention from the Board. . . .

Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503, 508-09 (7th Cir. 1980). The Board's "reticence" was also observed by Judge Bryan in the opinion of the panel majority below:

> With apparently necessary repetition, we reiterate that elections are the preferred measure of employee sentiment under the Act. . . . [B]efore a bargaining order may issue, the Board must demonstrate, with particularity, why traditional remedies probably will not protect employees' rights under § 7 of the Act.

[A12].

Although each factual setting is different, the circuit courts of appeal have responded in essentially three ways to the Board's recurrent failure to provide its reasoning for issuing bargaining orders. In the First, Sixth, Ninth and Tenth Circuits, unless the Board specifically articulates its *Gissel* analysis for issuing a bargaining order, an application for enforcement thereof in a "Category II" case will not be enforced, but will be remanded to the Board for further explication. For example, in *NLRB v. American Spring Bed Manufacturing Co.*, 670 F.2d 1236 (1st Cir. 1982), the court stated that paying "lip service" to the requirements of *Gissel* would not be sufficient in that circuit to justify the enforcement of a bargaining order. Instead, the Board's decision must manifest

> precise reasons for concluding that: (1) the employer's unfair labor practices so undermined the Union's majority that conducting a fair election would be unlikely; (2) the employer's unlawful conduct was likely to continue; and (3) the ordinary remedies of back pay, reinstatement, and posting of notices would be inadequate to ensure a fair election.

Id. at 1247. The court refused to enforce the bargaining order because the Board "proferred no reasons to explain why the Company would not obey a cease and desist order accompanied by the posting of appropriate notices." *Id.* at 1248. *See also NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978); *NLRB v. Cott Corp.*, 578 F.2d 892 (1st Cir. 1978).[9]

The Second Circuit has also stated that it will not enforce bargaining orders which are not first substantiated by detailed *Gissel* findings. In *NLRB v. Marion Rohr Corp., Inc.*, 714 F.2d 228 (2d Cir. 1983), the court reiterated the principle that the bargaining order may only be issued after the Board "demonstrates that an election is unlikely to reflect the uncoerced preference of the bargaining unit." *Id.* at 230. The court reasoned that "[t]he listing of unfair labor practices followed by the conclusory statement that a fair election is no longer possible does not satisfy the Board's responsibility to analyze the attending circumstances." *Id.* at 231. *See also NLRB v. Pace Oldsmobile, Inc.*, 681 F.2d 99 (2d Cir. 1982); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263 (2d Cir. 1981); *J. J. Newberry Co. v. NLRB*, 645 F.2d 148 (2d Cir. 1981); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980).

Likewise, the Sixth Circuit scrutinizes Board decisions "more closely when [the Board] has imposed the very strong remedy of issuing a bargaining order. . . ." *NLRB v. Rexair, Inc.*, 646 F.2d 249, 250 (6th Cir. 1981). *See also NLRB v. Valley Plaza, Inc.*, 715 F.2d 237 (6th Cir. 1983); *United Services For The Handicapped v. NLRB*, 678 F.2d 661 (6th Cir. 1982); *Donn Products, Inc. v. NLRB*, 613 F.2d 162 (6th Cir. 1980). *Cf., South-*

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[9] That the instant case conflicts with the decisions of the First Circuit is made clear by the ALJ's admission that he refused to consider *Pilgrim Foods* because he was only "bound to apply established Board precedent." [A127].

ern Moldings, Inc. v. NLRB, 715 F.2d 1069 (6th Cir. 1983).

The Ninth and Tenth Circuits also remand to the Board for further consideration when the Board fails to set forth its specific reasons for issuing a bargaining order. *See, e.g., Fitzgerald v. Century Park, Inc.*, 642 F.2d 356 (9th Cir. 1981); *NLRB v. Western Drug*, 600 F.2d 1324 (9th Cir. 1979); *NLRB v. Wilhow Corp.*, 666 F.2d 1294 (10th Cir. 1981); *NLRB v. Miller Trucking Service, Inc.*, 445 F.2d 927 (10th Cir. 1971).

A second response to the Board's failure to justify its imposition of a bargaining order using the *Gissel* guidelines is found in the opinions of the Seventh Circuit, wherein the court undertakes to conduct its own *Gissel* analysis. In *NLRB v. Century Moving & Storage, Inc.*, 683 F.2d 1087 (7th Cir. 1982), the court explained its reasoning as follows:

> Where the Board has not given us the benefit of its expertise by making specific findings showing that a bargaining order is justified, we have reluctantly made the essential analysis ourselves, to avoid further delay inherent in a remand to the Board. . . . The Board's failure to make the necessary specific findings here causes us to follow this course.

Id. at 1093. *See also Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503 (7th Cir. 1980); *First Lakewood Associates v. NLRB*, 582 F.2d 416 (7th Cir. 1978); *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973).

The Third, Fifth and Eighth Circuits join the decision of the *en banc* majority below in advocating a third theory of review. Those circuits give greater deference to Board decisions in "Category II" cases than the other circuits by not requiring any explanation whatsoever to support its *Gissel* conclusions.

For example, in *NLRB v. Keystone Pretzel Bakery, Inc.*, 696 F.2d 257 (3d Cir. 1982), the court enforced the Board's bargaining order even though the Board's written decision merely listed the employer's unfair labor practices and recited, by rote, the conclusions which *Gissel* requires. *See also NLRB v. Eastern Steel Co.*, 671 F.2d 104 (3d Cir. 1982); *NLRB v. Permanent Label Corp.*, 657 F.2d 512 (3d Cir. 1981). Similarly, the Fifth Circuit in *NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493 (5th Cir. 1980), enforced the issuance of a bargaining order despite "[t]he generality of the Board's findings" because the "record substantially support[ed] the Board's conclusions." *Id.* at 498. *See also Chromalloy American Corp. v. NLRB*, 620 F.2d 1120 (5th Cir. 1980); *but see NLRB v. American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970). The Eighth Circuit, in *NLRB v. Ely's Foods Inc.*, 656 F.2d 290 (8th Cir. 1981), supported its decision to enforce a bargaining order by recalling the *Gissel* Court's admonition that employees may always disavow a union by filing a representation petition. *See also NLRB v. Suburban Ford, Inc.*, 646 F.2d 1244 (8th Cir. 1981).[10]

Thus, a conflict among the circuits exists with respect to the specificity with which the Board must justify its issuance of a "Category II" bargaining order. Because of the conflict, the importance of having a uniform standard of review in the circuit courts and the severity of the bargaining order remedy, this Court's review of the Fourth Circuit's *en banc* decision is warranted.

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[10] Another recent decision of the Eighth Circuit, however, is not in agreement. In *Patsy Bee, Inc. v. NLRB*, 654 F.2d 515 (8th Cir. 1981), decided by a different panel just nine days before *Ely's Foods*, the court refused to enforce the bargaining order because the Board's "conclusory statement" supporting the issuance of the order did not sufficiently explain why the Board's less severe remedies would not have sufficed to ensure a fair and free election.

CONCLUSION

For the reasons herein expressed, petitioner, Maidsville Coal Company, Inc., respectfully requests the Court to grant this petition for a writ of certiorari.

Respectfully submitted,

ROBERT M. STEPTOE, JR.
(Counsel of Record)
C. DAVID MORRISON
STEPTOE & JOHNSON
Union National Center East
P. O. Box 2190
Clarksburg, WV 26302-2190
(304) 624-8000
Counsel for Petitioner

STEPTOE & JOHNSON
Clarksburg, WV
Of Counsel